CONVERSION BY A HOLDER OF SECURITY.—In general the right of a bailor to sue his bailee in trover depends upon the inconsistency of the bailee's acts with the existence of the bailment; such acts terminate the bailment and constitute actionable conversion.[1] However, when the bailee holds goods as security, tender by the bailor is obviously a condition precedent to his right to demand possession of his chattel.[2] Accordingly, it would seem that only those acts which dispense with this condition revest in the debtor the immediate right to possession essential to an action in trover. The rights and liabilities of a common law lienor are well defined. He is entitled to perform one act, and one only, which if committed by an ordinary bailee would amount to an adverse assertion of ownership; he may actively assert his lien by insisting on a tender as a condition precedent to his obligation to redeliver.[3] Since, however, this right depends on his possession, he loses it when possession is voluntarily relinquished.[4] Consequently, a sale or repledge by the lienor,[5] or an unqualified refusal by him to restore on demand,[6] dispenses with tender and revests in the owner the immediate right to possession. The rights of a pledgee, on the other hand, though concededly of greater extent, are difficult of exact definition. His interest may be assigned, and so the property pledged may be repledged for the same or a lesser amount;[7] and in some jurisdictions tender is necessary to entitle the pledgor to recover in trover from the pledgee,[8] or from a third party holding the goods by virtue of an unauthorized sub-pledge or sale.[9] This requirement seems questionable where the suit is against the original pledgee. The result is due, however, to a recognition of a so-called qualified property in the pledgee which his wrongful disposal of the pledge does not destroy.[10]

The rights and liabilities of the pledgee, it is submitted, are to be ascertained by an application of the principles of contract rather than those of property. By the contract of pledge redelivery by the pledgee is conditioned on payment or tender by the pledgor;[11] but it is elementary that certain acts by one contracting party may render unnecessary performance of a condition precedent by the other; tender is unnecessary if useless.[12] Therefore, where the pledgee has voluntarily disabled himself from delivering, upon performance of the

[1]Pollock, Torts (8 ed.) 364.

[2]Cumnock *v.* Newburyport Savings Inst. (1886) 142 Mass. 342.

[3]Scarfe *v.* Morgan (1838) 4 M. & W. 270.

[4]Jacobs *v.* Latour (1828) 5 Bing. 130.

[5]M'Combie *v.* Davies (1805) 7 East 5; Jones *v.* Pearle (1723) 1 Strange 557; Mulliner *v.* Florence (1878) L. R. 3 Q. B. Div. 484; Jacobs *v.* Latour *supra.*

[6]Hanna *v.* Phelps (1855) 7 Ind. 21; Boardman *v.* Sill (1808) 1 Camp. 410, note.

[7]Mores *v.* Conham (1609) Owen 123; Russell *v.* Fillmore (1843) 15 Vt. 130; Story, Bailments §§ 324, 327.

[8]Halliday *v.* Holgate (1868) L. R. 3 Ex. 299; Cumnock *v.* Savings Inst. *supra.*

[9]Donald *v.* Suckling (1866) L. R. 1 Q. B. 585.

[10]Donald *v.* Suckling *supra.*

[11]Cumnock *v.* Savings Inst. *supra.*

[12]Short *v.* Stone (1846) 8 Q. B. Rep. 358; *cf.* Cort & Gee *v.* Ry. Co. (1851) 17 Q. B. Rep. 127.

condition of tender, he may be deemed to have waived that condition.[13] This apparently is the case when the pledgee destroys or consumes the goods pledged, or sells or repledges them for a time or amount exceeding that of the original pledge.[14] Such acts, therefore, since they dispense with tender, revest an immediate right of possession in the pledgor and so constitute a conversion. The liability of the purchaser or sub-pledgee, however, must rest on other grounds; the doctrine of waiver can scarcely be extended to make his purchase from the pledgee, in itself, a conversion. Since the pledgee can rightfully assign his actual interest in the pledge, even when wrongfully purporting to assign more,[15] the purchaser is entitled to payment of the sum originally secured before relinquishing the pledge; and such payment of necessity discharges the debt.[16] Accordingly, a tender and refusal have been properly held necessary to render the purchaser liable for conversion.[17] The courts, however, have failed to distinguish between the pledgee's liability and that of his vendee. A persuasive analogy is found where chattels are owned in common. A sale by one co-tenant, of the whole or a part of the common property, as exclusively his own, is a conversion,[18] as is a subsequent sale by his vendee.[19] But trover does not lie against the vendee when still in possession although he claims as sole owner, since he has by the sale acquired the interest of the co-tenant, his vendor.[20]

In a recent case, *Swank* v. *Elwert* (Ore. 1910) 105 Pac. 901, the court applied these principles to a chattel mortgage and allowed the mortgagor to recover in trover against the mortgagee who had foreclosed irregularly, although no tender was made. Such a result is impossible in a jurisdiction where a chattel mortgage passes a conditional title.[21] Where, however, as in Oregon, a chattel mortgage does not pass title but confers on the mortgagee the right to take possession on condition broken, the interest of a mortgagee lawfully in possession seems closely analogous to that of a pledgee.[22] Thus, negligence in caring for the mortgaged property does not constitute conversion,[23] nor does a claim of absolute title;[24] but an unauthorized sale renders the mortgagee liable in trover though no tender is made.[25]

Most jurisdictions which dispense with tender as a prerequisite

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[13]Cortelyou *v.* Lansing (N. Y. 1805) 2 Caines' Cas. 200.

[14]Wilson *v.* Little (1849) 2 N. Y. 443; Neiler *v.* Kelley (1871) 69 Pa. St. 403; Feige *v.* Burt (1898) 118 Mich. 243; Baltimore Ins. Co. *v.* Dalrymple (1866) 25 Md. 269.

[15]Belden *v.* Perkins (1875) 78 Ill. 449; Williams *v.* Ashe (1896) 111 Cal. 180.

[16]Talty *v.* Freedman's Trust Co. (1876) 93 U. S. 321.

[17]Williams *v.* Ashe *supra;* Talty *v.* Freedman's Trust Co. *supra.*

[18]White *v.* Osborn (N. Y. 1839) 21 Wend. 72; Wheeler *v.* Wheeler (1851) 33 Me. 347; Shepard *v.* Pettit (1883) 30 Minn. 119.

[19]Weld *v.* Oliver (1839) 38 Mass. 559.

[20]Dain *v.* Cowing (1843) 22 Me. 347.

[21]Jefferson *v.* Barkto (1878) 1 Ill. App. 568.

[22]Iler *v.* Baker (1890) 82 Mich. 226.

[23]Croze *v.* St. Mary's Canal Co. (1906) 143 Mich. 514.

[24]Card *v.* Fowler (1899) 120 Mich. 646.

[25]Brink *v.* Freoff (1879) 40 Mich. 610, (1880) 44 Mich. 69; Iler *v.* Baker *supra.*

to an action in trover follow the earlier English rule[26] as to damages and hold the measure thereof to be the difference between the value of the goods converted and the debt.[27] Conversely, the pledgor when sued for the debt may set off the value of the pledge.[28] Although on principle it is anomalous to allow a recovery in trover for anything less than the value of the goods converted,[29] yet as the action in substance sounds in contract[30] the courts apply the contract rule and allow recoupment as for claims growing out of the same transaction;[31] a rule convenient in practice. The same reasons apparently urge its adoption when a chattel mortgagee is sued for conversion.[32] This rule, therefore, seems properly to have been applied in the principal case.

TENDER NECESSARY TO DISCHARGE A MORTGAGE LIEN.—At common law, payment or tender of payment by the pledgor, either at the day conditioned, or later, was sufficient to discharge the lien on the goods, provided the tender was refused.[1] In the case of a mortgage, the tender at the day, if refused, was a sufficient discharge, for it was a performance of the condition and the condition being complied with the lien was gone.[2] After the day, however, neither tender nor payment had any effect, the title, by the non-performance at maturity, being absolutely vested in the mortgagee.[3] This distinction is largely based on the essential differences in the nature of a pledge and a mortgage. In the former, the title was at all times in the pledgor. The pledgee had possession simply, coupled sometimes with the power to sell.[4] In the latter, a mortgagor had only a right to redeem, the legal title being in the mortgagee, subject to divestment upon the performance of the condition. The modern tendency, however, has been to consider a mortgage, not so much a vested estate to be defeated on a contingency, but rather a mere security for the primary obligation, the debt. This view in effect prevails in most of the states of this country. The result is great confusion as to the effect of a tender after the law day.

Of course, where the common law theory still obtains neither tender nor payment after the day of maturity is of any avail, the time for the performance having past, the mortgagor's only remedy

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[26]Johnson *v.* Stear (1863) 15 C. B. (N. S.) 330.

[27]Neiler *v.* Kelley *supra.*

[28]Stearns *v.* Marsh (N. Y. 1847) 4 Denio 227; Richardson *v.* Ashby (1895) 132 Mo. 238.

[29]Pollock, Torts (8 ed.) 358.

[30]Johnson *v.* Stear *supra.*

[31]Bulkeley *v.* Welch (1863) 31 Conn. 339.

[32]Iler *v.* Baker *supra.*

[1]Comyn's Dig. Tit. Mort. B.; Mitchell *v.* Roberts (1883) 17 Fed. 776; Coggs *v.* Bernard (1703) 2 Ld. Raymond 909, 917; Ball *v.* Stanley (Tenn. 1833) 5 Yerg. 199.

[2]Erskine *v.* Townsend (1807) 2 Mass. 493; Merrill *v.* Chase (Mass. 1862) 3 Allen 339.

[3]Phelps *v.* Sage (Conn. 1805) 2 Day 151; Currier *v.* Gale (Mass. 1865) 9 Allen 522.

[4]Franklin *v.* Neate (1844) 13 M. & W. 481.